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FILED
MAY 3 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 758

HOLLYWOOD CIRCLE, INC., a corporation,

Petitioner and Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; RUSSELL S. MUNRO, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; PHILIP E. DAVIS, AREA ADMINISTRATOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Defendants and Respondents.

PETITION FOR WRIT OF CERTIORARI.

ROBERT M. MASLOW,
ALBERT E. ISENBERG,
DON LOWRY and
RONALD H. FREEMOND,
401 City National Bank Bldg.,
404 North Roxbury Drive,
Beverly Hills, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Statement of matters required by Rule 23 2

1. Petitioner seeks a review of the final decision of the District Court of Appeal of the State of California. A copy of the opinion of said court is attached hereto, marked Exhibit "A" and made a part hereof by reference 2

2. The grounds on which jurisdiction of this court is invoked are as follows 2

3. The questions here presented for review are as follows 3

4. The constitutional provision and statutes which this case involves are as follows 4

5. Statement of the case 7

6. The federal questions sought to be reviewed here were raised in the court of first instance, to wit: the Superior Court of the State of California, in and for the County of Los Angeles 10

Argument in support of writ of certiorari 11

I.

The administrative agency and the courts of the State of California have denied due process of law and equal protection of the laws to petitioner by so applying the statutes of the State of California as to deprive petitioner of its right of appeal by the administrative agency 11

A. There is a denial of due process of law in requiring exhaustion of administrative remedies and penalizing a person for endeavoring to exhaust its administrative remedies, all at the same time 13

B. The language of the California statute provides for filing of an appeal within 40 days after the "final decision of the Department." This language conforms to common sense but has not been followed by the Appeals Board and the courts of the State of California 16

PAGE

C. In any event, under Section 1013 of the Code of Civil Procedure of the State of California, petitioner had an additional 5 days to file its appeal and did thereby file within time 17

II.

There was a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States in this case by virtue of the refusal of the Appeals Board to prepare the transcript of the administrative hearing on proper request therefor 18

III.

The administrative agency in this case failed to comply with the express requirements of the California statute for entry of its order within sixty days from the filing of the appeal. Due process of law and equal protection of the laws must apply equally, both to the conduct of the person and the conduct of the state and its agencies 21

IV.

There is a denial of due process of law and equal protection of the laws where the statutes of a state provide concurrent administrative and judicial remedies and the courts of that state deny the use of the judicial remedy provided for by statute 22

Conclusion 24

Appendix:

Exhibit A. Opinion of the District Court of Appeal ..... App. p. 1

Exhibit B. Pertinent constitutional provisions and statutes of the State of California ..... App. p. 7

Exhibit C. Decision of the Alcoholic Beverage Control Appeals Board of the State of California ..... App. p. 26

TABLE OF AUTHORITIES CITED

CASES

PAGE

Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P. 2d 942 13

Alexander v. State Personnel Board, 22 Cal. 2d 198, 137 P. 2d 433 13

City of Susanville v. Lee C. Hess Co., 48 Cal. 2d 684 22

Cochran v. State of Kansas, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453 ..... 14, 20

Dowd v. United States, 340 U. S. 206, 71 S. Ct. 262, 95 L. Ed. 215 14

Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 144 P. 2d 4 12

Moyer v. State Board of Equalization, 140 Cal. App. 2d 651, 295 P. 2d 583 12

People v. Callaway, 127 Cal. App. 504, 274 P. 2d 497 20

Scripps Memorial Hospital, Inc. v. California Employment Commission, 24 Cal. 2d 669, 151 P. 2d 109 22

Stoumen v. Reilly, 37 Cal. 2d 713, 234 P. 2d 969 24

Swegle v. State Board of Equalization, 125 Cal. App. 2d 432, 270 P. 2d 518 24

STATUTES

Business and Professions Code, Sec. 23049 4

Business and Professions Code, Sec. 23051 4

Business and Professions Code, Sec. 23052 4

Business and Professions Code, Sec. 23075 4

Business and Professions Code, Sec. 23080 4

Business and Professions Code, Sec. 23081 ..... 4, 13, 16, 17, 23

Business and Professions Code, Sec. 23082 ..... 4, 16

Business and Professions Code, Sec. 23083 ..... 4, 19

Business and Professions Code, Sec. 23084 ..... 4, 19, 23

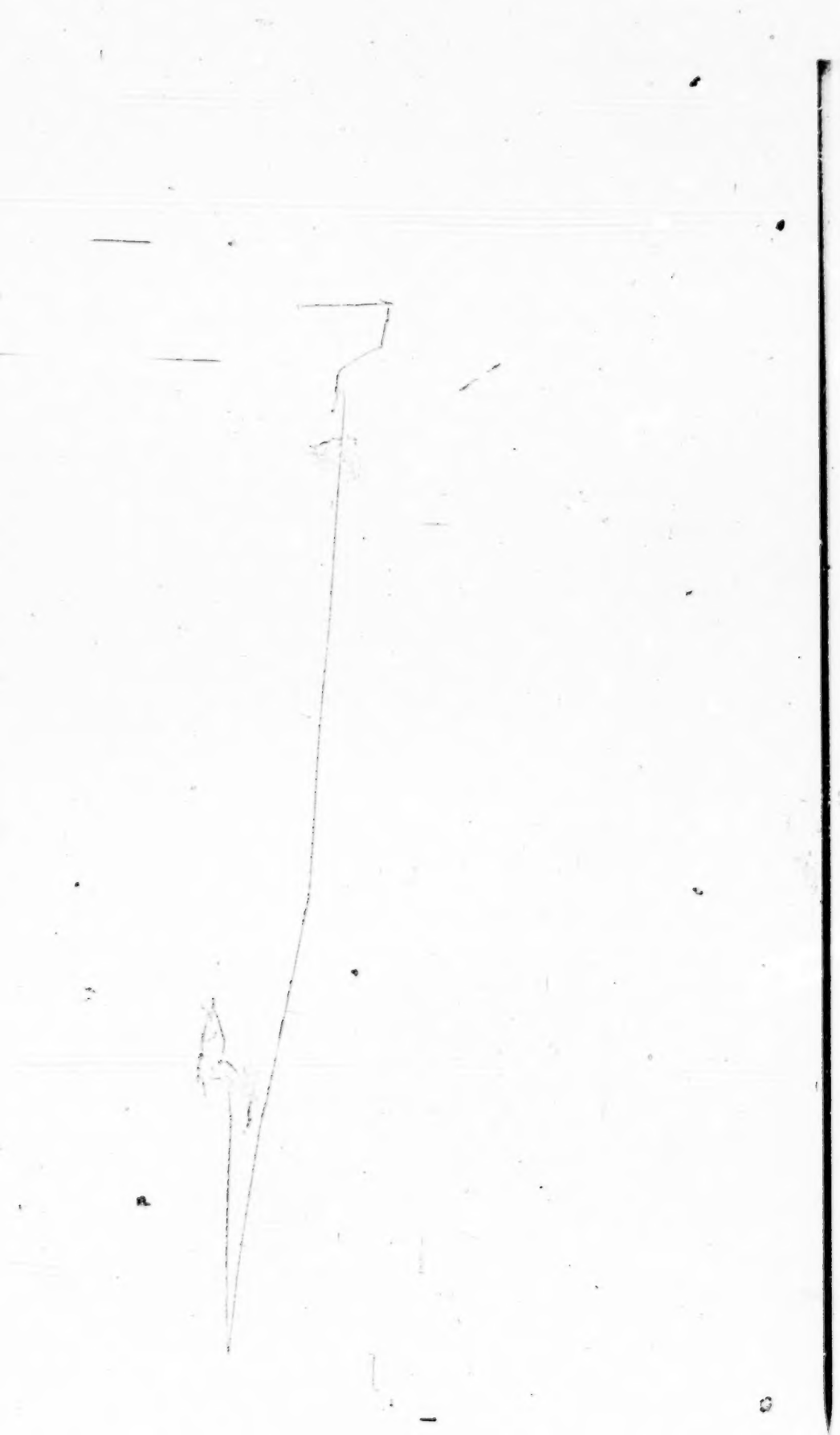
Business and Professions Code, Sec. 23085 5

Business and Professions Code, Sec. 23086 ..... 5, 21

Business and Professions Code, Sec. 23090 5

PAGE

Business and Professions Code, Sec. 23091 5
Business and Professions Code, Sec. 24300 ..... 5, 11
Business and Professions Code, Sec. 24301 5
Business and Professions Code, Sec. 25750 5
Business and Professions Code, Sec. 25751 5
Business and Professions Code, Sec. 25760 ..... 5, 17
California Constitution, Art. XX, Sec. 22 ..... 4, 11
Code of Civil Procedure, Sec. 1013 ..... 6, 17, 18
Code of Civil Procedure, Sec. 1094.5 ..... 6, 22, 23
Government Code, Sec. 11500 6
Government Code, Sec. 11501 ..... 6, 13
Government Code, Sec. 11521 ..... 6, 13
Government Code, Sec. 11521(a) 11, 15
Government Code, Sec. 11523 ..... 6, 19, 22, 23
Government Code, Sec. 11524 ..... 6, 16
Statutes of 1945, Chap. 867, Sec. 1, p. 1635 ..... 6, 16
Statutes of 1945, Chap. 868, Sec. 1 ..... 6, 22
Statutes of 1947, Chap. 491, Sec. 1, p. 1469 6
Statutes of 1949, Chap. 358, Sec. 1 ..... 6, 22
Statutes of 1949, Chap. 456, Sec. 3 ..... 6, 18
Statutes of 1953, Chap. 961, Sec. 1 6
Statutes of 1953, Chap. 962, Sec. 1 ..... 6, 19, 22
Statutes of 1953, Chap. 964, Sec. 1 ..... 6, 11, 16
Statutes of 1954, 1st Ex. Sess., Chap. 20, Sec. 3 ..... 4, 5, 16, 17, 19, 21, 23
Statutes of 1955, Chap. 246, Sec. 1 ..... 6, 19, 22
Statutes of 1955, Chap. 447, Sec. 95 ..... 5, 11
Statutes of 1955, Chap. 447, Sec. 96 5
Statutes of 1955, Chap. 453, Sec. 1 ..... 6, 13
Statutes of 1955, Chap. 1842, Sec. 18 5
Statutes of 1955, Chap. 1842, Sec. 19 5
Statutes of 1955, Chap. 1842, Sec. 23 ..... 5, 17
United States Constitution, Fourteenth Amendment 3, 14



IN THE

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OCTOBER TERM, 1956.

No. ...../.....

HOLLYWOOD CIRCLE, INC., a corporation,
Petitioner and Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; RUSSELL S. MUNRO, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; PHILIP E. DAVIS, AREA ADMINISTRATOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,
Defendants and Respondents.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, Hollywood Circle, Inc., a corporation, hereby petitions the Supreme Court of the United States for a writ of certiorari in the above-entitled cause after final decision by the District Court of Appeal of the State of California, Second Appellate District.

Statement of Matters Required by Rule 23.

1. **Petitioner Seeks a Review of the Final Decision of the District Court of Appeal of the State of California. A Copy of the Opinion of Said Court Is Attached Hereto, Marked Exhibit "A" and Made a Part Hereof by Reference.**

The official citation for said decision is 153 A. C. A. 576. The Supreme Court of the State of California refused to grant a hearing in a split decision on petition for hearing by petitioner.

2. **The Grounds on Which Jurisdiction of This Court Is Invoked Are as Follows:**

(a) Judgment of the Superior Court of the State of California, in and for the County of Los Angeles, is dated August 21, 1956 [Clk. Tr. p. 24, line 29]. Said judgment was entered on August 21, 1956, in Judgment Book No. 3146, page 217, of Book of Judgments of said Court [Clk. Tr. p. 67, lines 29-31].

(b) The decision of the District Court of Appeal of the State of California, Second Appellate District, affirming the said judgment, was made on September 3, 1957, and entered on September 3, 1957. The said District Court of Appeal denied a rehearing on September 25, 1957. The Supreme Court of the State of California denied a hearing on October 30, 1957. The decision of the District Court of Appeal of the State of California became final on November 4, 1957, at which time remittitur was issued from said Court. No extension of time has been obtained within which to petition for certiorari.

(c) Jurisdiction is conferred on this Court to review the judgment in question by writ of certiorari by reason

of the due process clause and equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States.

3. The Questions Here Presented for Review Are as Follows:

(1) Is a person denied due process of law and equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States where the Statutes of a State create a right of administrative appeal and the Statutes are so applied as to deny that right to a person injured by the decision of an administrative agency of that State?

(2) Is a person denied due process of law under the Fourteenth Amendment of the Constitution of the United States where an administrative agency is required to consider an appeal from an administrative decision by means of a transcript of the administrative hearing, and said agency refuses to prepare the transcript of said hearing on proper request therefor?

(3) Is a person deprived of due process of law or of equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States where an administrative agency fails to comply with the express requirement of the statute of a state for entry of an administrative order?

(4) Is a person denied due process of law and equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States where the statutes of a state provide concurrent administrative and judicial remedies, and the courts of that state deny to a person the use of the judicial remedy provided for by statute?

4. The Constitutional Provision and Statutes Which This Case Involves Are as Follows:

A. The California Constitution, Article XX, Section 22, amended on November 2, 1954.

B. The following sections of the Business and Professions Code of the State of California:

(1) Section 23049 of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(2) Section 23051 of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(3) Section 23052, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(4) Section 23075, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(5) Section 23080, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(6) Section 23081, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(7) Section 23082, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(8) Section 23083, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(9) Section 23084, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(10) Section 23085, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(11) Section 23086, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(12) Section 23090, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(13) Section 23091, of the Business and Professions Code, added by Statutes, First Ex. Session, 1954, Chap. 20, Sec. 3, operative January 1, 1955;

(14) Section 24300, of the Business and Professions Code, amended by Statutes, 1955, Chap. 447, Sec. 95, substituting "department" for "board" each time;

(15) Section 24301, of the Business and Professions Code, amended by Statutes, 1955, Chap. 447, Sec. 96, substituting "department" for "board" each time;

(16) Section 25750, of the Business and Professions Code, amended by Statutes, 1955, Chap. 1842, Sec. 18, substituting "the department" for "the board" at the beginning of the section;

(17) Section 25751, of the Business and Professions Code, amended by Statutes, 1955, Chap. 1842, Sec. 19, substituting "department" for "board";

(18) Section 25760, of the Business and Professions Code, amended by Statutes 1955, Chap. 1842, Sec. 23, substituting, (1) "department" for "board" after "notice of any act of the" at the beginning of the section, and (2) "director or an authorized employee of the department" for "board, its secretary or an authorized employee of the board".

C. The following sections of the Government Code of the State of California:

(1) Section 11500 of the Government Code, amended by Statutes, 1947, Chap. 491, Sec. 1, p. 1469;

(2) Section 11501 of the Government Code, amended by Statutes, 1953, Chap. 961, Sec. 1; Statutes, 1955, Chap. 453, Sec. 1;

(3) Section 11521 of the Government Code, amended by Statutes, 1953, Chap. 964, Sec. 1;

(4) Section 11523 of the Government Code, amended by Statutes, 1953, Chap. 962, Sec. 1; Statutes, 1955, Chap. 246, Sec. 1;

(5) Section 11524 of the Government Code, added by Statutes, 1945, Chap. 867, Sec. 1, p. 1635.

D. The following sections of the Code of Civil Procedure:

(1) Section 1013 of the Code of Civil Procedure, added by Statutes 1949, Chap. 456, Sec. 3;

(2) Section 1094.5 of the Code of Civil Procedure, added by Statutes, 1945, Chap. 868, Sec. 1; amended by Statutes, 1949, Chap. 358, Sec. 1.

The aforesaid constitutional provisions and statutes of the State of California are attached hereto in an appendix and set forth at length and marked Exhibit "B" and made a part hereof by reference.

5. Statement of the Case.

For five years, petitioner had held an on-sale general liquor license and had never received any disciplinary action or been subjected to any suspension of its license [Clk. Tr. p. 44, line 32, to p. 45, line 4]. On January 31, 1956, a hearing was held before a single hearing officer of the Department of Alcoholic Beverage Control of the State of California, on an accusation charging that petitioner "did suffer and permit its premises to be used as a place to which persons did resort for purposes contrary to public welfare and morals" [Clk. Tr. p. 45]. The hearing officer recommended that petitioner's license be revoked [Clk. Tr. p. 3]. The Department of Alcoholic Beverage Control of the State of California, on March 22, 1956, adopted the decision of the hearing officer as its own, and mailed its decision to petitioner on March 23, 1956 [Clk. Tr. p. 5, lines 3-6].

Testimony had been permitted at the hearing, over petitioner's objection, of numerous events, incidents and conversations which occurred *outside* of petitioner's premises and of which petitioner had no knowledge [Clk. Tr. p. 46, line 21, to p. 47, line 13]. The hearing officer used this incompetent testimony improperly to make findings of fact against the petitioner. There was no evidence presented at the hearing that petitioner or any of its officers or employees had knowledge of any overt acts or conduct charged in the accusation [Clk. Tr. p. 49, lines 12-15].

Petitioner sought a review of the decision of the hearing officer on its merits. On April 10, 1956, petitioner mailed

its Petition for Reconsideration to the Department of Alcoholic Beverage Control [Clk. Tr. p. 5, lines 10-13], and petitioner requested the Department to prepare a transcript of the record of the hearing held by the hearing officer. On April 11, 1956, the Department of Alcoholic Beverage Control received petitioner's Petition for Reconsideration. On April 20, 1956, the Department denied the petition without reviewing the hearing on the merits [Clk. Tr. p. 5, lines 14-15]. *Although the Department denied said petition on April 20, 1956, the Department did not notify petitioner that its petition for reconsideration had been denied until May 2, 1956* [Clk. Tr. p. 5, lines 15-18].

Immediately upon receipt of the notice from the Department, of the Department's decision denying its petition for reconsideration, petitioner notified respondents that it intended to proceed with an appeal [Clk. Tr. p. 7, lines 9-12] and, again, on May 2, 1956, requested respondents to prepare a transcript of the record of the hearing held by the hearing officer, forwarding to respondents the necessary fees to pay for the transcript [Clk. Tr. p. 7, lines 14-20]. On the very next day, May 3, 1956, petitioner mailed its appeal to the Alhocolic Beverage Control Appeals Board of the State of California (hereinafter referred to as "the Appeals Board") air mail special delivery [Clk. Tr. p. 5, lines 19-23]. On May 7, 1956, the following Monday, respondents returned to petitioner the fees for preparation of the transcript and refused to prepare the same [Clk. Tr. p. 7, lines 22-24] and on the same date filed petitioner's appeal [Clk. Tr. p. 5, lines 23-25].

On July 12, 1956, the Appeals Board adopted its decision dismissing petitioner's appeal without reviewing the same on the merits, on the ground that the appeal had been filed too late [Clk. Tr. p. 5, line 26, to p. 6, line 9].

On July 20, 1956, petitioner filed its petition for writ of mandate in the Superior Court of the State of California, in and for the County of Los Angeles, requesting said Court to order the Appeals Board to review the decision of the Department of Alcoholic Beverage Control on the merits [Clk. Tr. p. 10]. Prior to issuing the alternative writ of mandate, said Court required petitioner to file a supplemental petition, which was filed on July 23, 1956 [Clk. Tr. p. 44]. Respondents filed a general demurrer to the petition for writ of mandate, contending the only issue was whether the Appeals Board properly dismissed petitioner's appeal by reason of the alleged late filing of the same with the Appeals Board [Clk. Tr. pp. 11-19]. The Superior Court of the State of California, in and for the County of Los Angeles, sustained the demurrer of respondents to the petition for writ of mandate on the first hearing of said demurrer, without leave to amend [Clk. Tr. p. 22]. No review by the Court of the petition was had on the merits. Judgment for respondents was thereupon entered and the alternative writ of mandate was discharged [Clk. Tr. pp. 23-24].

Petitioner appealed to the District Court of Appeal of the State of California. Said Court affirmed the judgment for respondents.

Petitioner filed its petition for rehearing with said Court. Said petition was denied without opinion. Petitioner filed its petition for hearing with the Supreme Court of the State of California. Said petition was denied without a hearing.

Thus, there has never been a review of the hearing officer's decision in this case revoking petitioner's license on the merits, either by the Department of Alcoholic Beverage Control, the Appeals Board or by the courts.

6. The Federal Questions Sought to Be Reviewed Here Were Raised in the Court of First Instance, to wit: the Superior Court of the State of California in and for the County of Los Angeles.

Petitioner contended in the said trial court, as it contends here, that the denial of the right of the judicial review results in a denial of due process of law to petitioner [Clk. Tr. p. 61, line 31, to p. 62, line 20] The Federal questions here presented were raised by the allegations in the petition and supplemental petition for writ of mandate and by the points and authorities of petitioner in opposition to the demurrer of respondents thereto. The Superior Court of the State of California, in and for the County of Los Angeles, did not render a written opinion and did not thereby expressly pass upon the questions here presented.

ARGUMENT IN SUPPORT OF WRIT OF CERTIORARI.

I.

The Administrative Agency and the Courts of the State of California Have Denied Due Process of Law and Equal Protection of the Laws to Petitioner by so Applying the Statutes of the State of California as to Deprive Petitioner of Its Right of Appeal by the Administrative Agency.

On November 2, 1954, the California Constitution was amended to remove the power to license and regulate alcoholic beverages from the Board of Equalization and to vest this power in the newly created Department of Alcoholic Beverage Control (Cal. Const., Art. XX, Sec. 22, Ex. B, p. 7). The constitutional amendment enacted at that time created the Alcoholic Beverage Control Appeals Board. Prior to the adoption of this constitutional amendment, the Alcoholic Beverage Control Act required the State Board of Equalization, and now requires the Department of Alcoholic Beverage Control (hereinafter referred to as "the Department"), to conduct its proceedings in accordance with the Administrative Procedure Act of the State of California (Bus. and Prof. Code, Sec. 24300, as amended, Stats. 1955, Chap. 447, p. 917, Sec. 95; Ex. B, p. 16).

The Administrative Procedure Act of the State of California expressly provides for reconsideration by the Department of the original decision suspending or revoking a license (Govt. Code, Sec. 11521(a) as amended by Stats. 1953, Chap. 964, Sec. 1). The courts of the State of California have uniformly held under the doctrine of exhaustion of administrative remedies that reconsidera-

tion represented the exercise of a continuing jurisdiction incident to a final determination of the case by the Administrative Agency.

Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 323, 144 P. 2d 4;

Moyer v. State Board of Equalization, 140 Cal. App. 2d 651, 295 P. 2d 583.

The California Supreme Court stated on this precise question in the *Lindell Co.* case, *supra*, at page 323, as follows:

> "This holding as to the board's continuing jurisdiction in this matter does not impair the efficacy of the general principle that action by an administrative board, when the authoritative law intends it to be final, may not thereafter be revoked. The only question to be determined is when action becomes final. That is, in every case a question dependent for its answer upon the scheme of the law by which power is conferred. Here it appears that finality is not reached while the Board of Permit Appeals, in the exercise of its discretion, has authority to grant a rehearing and arrive at a different conclusion as the result of a reexamination of the merits of the case."

In the instant case, petitioner filed its petition for reconsideration with the Department on April 11, 1956 [Tr. of Proceedings, Petition for Reconsideration, p. 1; Clk. Tr. p. 5, lines 10-13; p. 51, lines 30-32]. *Despite the fact that the Department denied petitioner's petition for reconsideration on April 20, 1956, respondents did not give notice to petitioner of the that the petition for reconsideration had been denied until May 2, 1956* [Clk. Tr. p. 5, lines 14-18]. Petitioner immediately notified respondents on the same day, May 2, 1956, that it intended to proceed with an appeal [Clk. Tr. p. 7, lines 9-12] and on the very

next day, May 3, 1956, petitioner mailed its appeal air mail special delivery to respondent [Clk. Tr. p. 5, lines 19-23]. On May 7, 1956, respondents filed the appeal and returned to petitioner the fees theretofore forwarded to respondents to prepare the transcript of the record of the hearing held by the hearing officer, refusing to prepare said transcript [Clk. Tr. p. 7, lines 22-24].

On July 12, 1956, the Appeals Board adopted its decision dismissing petitioner's appeal on the ground that the appeal had been filed more than 40 days after the original decision of the Department, and was therefore too late under Section 23081 of the Business and Professions Code of the State of California [Clk. Tr. p. 5, line 26, to p. 6, line 9].

A. There Is a Denial of Due Process of Law in Requiring Exhaustion of Administrative Remedies and Penalizing a Person for Endeavoring to Exhaust Its Administrative Remedies, All at the Same Time.

Under Section 11501 of the Government Code of the State of California, known as the Administrative Procedure Act, the Department of Alcoholic Beverage Control is expressly included as an administrative agency subject to the provisions of the Act (Sec. 11501, as amended, Stats. 1955, Chap. 453, p. 932, Sec. 1). Section 11521 of the Government Code expressly provides for reconsideration by the Department after its original decision. The California Supreme Court expressly required application for rehearing to the administrative agency under the doctrine of exhaustion of administrative remedies.

Alexander v. State Personnel Board, 22 Cal. 2d 198, 137 P. 2d 433;

Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P. 2d 942.

In accordance with the requirement of the statute and of the courts of the State of California, petitioner applied for reconsideration on April 10, 1956, of the original decision of the Department of Alcoholic Beverage Control revoking petitioner's license [Clk. Tr. p. 5, lines 10-13; p. 51, lines 30-32; Tr. of Proceedings, Petition for Reconsideration, p. 3]. The Department had the power, under the Government Code of the State of California, to deny reconsideration, to order reconsideration, or to grant a stay of not to exceed thirty days for the purpose of filing an application for reconsideration. In the instant case, the Department denied reconsideration on April 20, 1956, but for reasons unknown to petitioner and unexplained by respondents, delayed giving notice of said denial of reconsideration until May 2, 1956 [Clk. Tr. p. 5, lines 15-18]. To add insult to injury, respondent Appeals Board then held that petitioner was required to file its appeal on May 3, 1956, a practical impossibility (Opinion of Appeals Board of the State of California, Ex. C attached hereto). Petitioner submits that this application of the statutes by respondents constitutes arbitrary and discriminatory conduct on the part of state agencies in violation of the due process and equal protection of the laws clauses of the Fourteenth Amendment of the Constitution.

It is, of course, established that a discriminatory denial of the statutory right of appeal is a violation of the equal protection clauses of the Fourteenth Amendment.

Dowd v. United States, 340 U. S. 206, 71 S. Ct. 262, 95 L. Ed. 215;

Cochran v. State of Kansas, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453.

The holding of the Appeals Board, as affirmed by the District Court of Appeal of the State of California, re-

quires the licensee to file its appeal in Sacramento, California, within forty days after the original decision of the Department (Opinion of the District Court of Appeal, Ex. A attached hereto; Opinion of the Appeals Board, Ex. C attached hereto). Petitioner has consistently contended that it is a denial of due process of law to require petitioner to petition for reconsideration before the Department within the 40-day period and, at the same time, require petitioner to file an appeal with the Appeals Board. The incongruity of the situation which here exists is dramatically indicated by the fact that petitioner here did not receive notice of denial of its petition for reconsideration until the day before its time period to file the appeal is alleged to have expired. Petitioner had the problem of preparing an appeal and of transmitting the appeal from Los Angeles, California, to Sacramento, California, and accomplishing filing of the same. The decision of the District Court of Appeal requires petitioner to have accomplished the preparation and filing of its appeal and the mailing of the same from Los Angeles to Sacramento, all within one day.

Petitioner has asked respondents, the Appeals Board, and the courts of the State of California to explain how it is possible to proceed with the administrative remedy and, at the same time, file an appeal within the time prescribed. Petitioner has also asked, and never received an answer, why the Department delayed for 12 days in notifying petitioner of its decision denying reconsideration. Had reconsideration been granted, or had the Department granted a stay or a continuance, as authorized by the Government Code of the State of California, there would not have been one day to file an appeal from the original decision of the Department (Govt. Code, Sec. 11521(a),

amended by Stats. 1953, Chap. 964, Sec. 1; for power to grant continuances, see Govt. Code, Sec. 11524, added by Stats. 1945, Chap. 867, Sec. 1, p. 1635). Clearly, an administrative agency, with power and authority to grant reconsideration of its original decision, should not be deprived of jurisdiction by an improper application of the time period to file an appeal with an administrative appeals board. Under the California statute, once the Appeals Board acquires jurisdiction, the administrative agency, the Department of Alcoholic Beverage Control is deprived of jurisdiction (Bus. and Prof. Code, Sec. 23082, added by Stats., First Ex. Sess. 1954, Chap. 20, Sec. 3, operative Jan. 1, 1955). Neither the Appeals Board nor the courts of the State of California have attempted to explain any possible reason for depriving the administrative agency of its power of reconsideration by requiring an appeal within 40 days of the original decision of the administrative agency. This, however, is the clear result of the decision in this case.

B. The Language of the California Statute Provides for Filing of an Appeal Within 40 Days After the "Final Decision of the Department." This Language Conforms to Common Sense but Has Not Been Followed by the Appeals Board and the Courts of the State of California.

Section 23081 of the Business and Professions Code of the State of California provides as follows:

> "Within 40 days after the decision of the department is delivered or mailed to the parties, any party aggrieved by a *final decision of the department* may appeal to the board from such decision. The appeal shall be in writing and shall state the grounds upon which a review is sought. A copy of the appeal shall be mailed by the appellant to each party who appeared

in the proceeding before the department, including the department which shall thereafter be treated in all respects as a party to the appeal."

Bus. and Prof. Code, Sec. 23081, added by Stats. 1954, First Ex. Sess., Chap. 20, Sec. 3, operative January 1, 1955.

Petitioner's position has always been that the "final decision of the department" referred to in Section 23081 of the Business and Professions Code clearly was intended to include the decision of the Department on reconsideration. Thus, petitioner's appeal was in time, being filed on May 7, 1956, well within 40 days from the decision of the Department on April 20, 1956, denying reconsideration.

C. In Any Event, Under Section 1013 of the Code of Civil Procedure of the State of California, Petitioner Had an Additional 5 Days to File Its Appeal and Did Thereby File Within Time.

Section 25760 of the Business and Professions Code of the State of California provides that service of notice of any action of the Department shall be made in the manner prescribed by Section 1013 of the Code of Civil Procedure (Bus. and Prof. Code, Sec. 25760, amended by Stats. 1955, Chap. 1842, Sec. 23). Under that section, in case of service by mail, the service is complete at the time of deposit in the United States Post Office. Section 1013 of the Code of Civil Procedure, insofar as applicable here, provides as follows:

". . . The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is

extended one day, together with one day additional for every full 100 miles distance between the place of deposit and the place of address, if served by different post offices, but such extension shall not exceed thirty days in all."

Code Civ. Proc., Sec. 1013, added by Stats. 1949, Chap. 456, Sec. 3.

Sacramento, California, being over 400 miles from Los Angeles, petitioner had an additional four days within which to file its appeal and, therefore, its appeal was in time.

II.

There Was a Denial of Due Process of Law Under the Fourteenth Amendment of the Constitution of the United States in This Case by Virtue of the Refusal of the Appeals Board to Prepare the Transcript of the Administrative Hearing on Proper Request Therefor.

Upon mailing of its petition for reconsideration on April 10, 1956, to the Department, petitioner requested the Department to prepare a transcript of the record of the hearing held by the hearing officer. Again on May 2, 1956, upon receipt of notice of the denial of its petition for reconsideration petitioner requested respondents to prepare said transcript, forwarding to respondents the necessary fees to pay for the same [Clk. Tr. p. 7, lines 14-20]. On May 7, 1956, the very date on which the appeal was first filed with the Appeals Board, respondents, for some unknown reason, returned to petitioner the fees forwarded by petitioner for preparation of the transcript and refused to prepare the same [Clk. Tr. p. 7, lines 22-24]. It was not

until July 12, 1956, that the Appeals Board adopted its decision dismissing petitioner's appeal, without the benefit of a transcript of the hearing before the hearing officer [Clk. Tr. p. 5, line 26, to p. 6, line 9].

Section 23083 of the Business and Professions Code provides that, "the board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties." (Bus. and Prof. Code, Sec. 23083, added by Stats. 1954, First Ex. Sess., Chap. 20, Sec. 3, operative Jan. 1, 1955.) Section 23084 of the Business and Professions Code provides that review by the Appeals Board of the decision of the Department is limited to certain specific questions involving the proceedings before the Department (Bus. and Prof. Code, Sec. 23084, added by Stats. 1954, First Ex. Sess., Chap. 20, Sec. 3, operative Jan. 1, 1955).

Clearly, a transcript of the hearing before the Department was necessary to a proper decision by the Appeals Board. Until the decision in this case, it had always been recognized, under Section 11523 of the Government Code of the State of California, and all applicable decisions of the courts of the State of California, that the agency was required to prepare the complete record of the proceedings before the administrative agency within 30 days after a proper request therefor and upon payment of the fees required for the preparation of the record (Govt. Code, Sec. 11523, amended by Stats. 1953, Chap. 962, Sec. 1; Stats. 1955, Chap. 246, Sec. 1).

Petitioner submits respondents acted arbitrarily and capriciously and in violation of due process of law in refusing to prepare a transcript of the record here and in deciding this appeal without consideration of the record before the administrative agency.

It has been repeatedly recognized that while ordinarily the filing of an appeal within the prescribed time is a jurisdictional prerequisite, the rule does not apply if the state, through its employees, fails to function in protection of an appellant's exercise of his right to appeal.

Cochran v. State of Kansas, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453;

People v. Callaway, 127 Cal. App. 504, 274 P. 2d 497.

In the *Callaway* case, *supra*, an appeal was not filed in time due to the fact that a prison official told the proposed appellant he would have plenty of time to file his notice of appeal, thus lulling him into a false sense of security. In the instant case, by refusing to prepare the transcript, the Appeals Board was in no position to determine this appeal. Further, as in the *Callaway* case, the administrative agency, by delaying until May 2, 1956, in giving notice of its denial of reconsideration, effectively prevented petitioner from filing an appeal on or before May 3, 1956. Petitioner submits such conduct on the part of the administrative agency of the State of California is discriminatory in nature and constitutes a denial of due process of law and equal protection of the laws.

III.

The Administrative Agency in This Case Failed to Comply With the Express Requirements of the California Statute for Entry of Its Order Within Sixty Days From the Filing of the Appeal. Due Process of Law and Equal Protection of the Laws Must Apply Equally, Both to the Conduct of the Person and the Conduct of the State and Its Agencies.

Section 23086 of the Business and Professions Code of the State of California provides as follows:

> *"In all cases the board shall enter its order within 60 days after the filing of an appeal."*
>
> Bus. and Prof. Code, Sec. 23086, added by Stats. 1954, First Ex. Sess., Chap. 20, Sec. 3, operative Jan. 1, 1955.

Petitioner's appeal was filed on May 7, 1956 [Clk. Tr. p. 5, lines 23-25]. On July 12, 1956, sixty-five days after the filing of the appeal, the Appeals Board entered its order dismissing petitioner's appeal [Clk. Tr. p. 5, line 26, to p. 6, line 9].

Section 23086, as above indicated, clearly states that *"in all cases"* the order of the Board must be entered within 60 days after the filing of the appeal. In the instant case, the order of the Board was not entered in time. Petitioner submits rules of law should apply equally to all parties. The administrative agencies of a state do not fall in any special categories excusing them from complying with the law. The order of the Appeals Board in the case was filed too late and was not effective. The courts of the State of California therefore erred in sustaining the demurrer to the petition based upon an invalid order of the Appeals Board.

IV.

There Is a Denial of Due Process of Law and Equal Protection of the Laws Where the Statutes of a State Provide Concurrent Administrative and Judicial Remedies and the Courts of That State Deny the Use of the Judicial Remedy Provided for by Statute.

It is well settled in California that where a statute provides an administrative remedy and also provides an alternative judicial remedy, the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved and having both remedies afforded him elects to use the judicial one.

City of Susanville v. Lee C. Hess Co., 48 Cal. 2d 684;

Scripps Memorial Hospital, Inc. v. California Employment Commission, 24 Cal. 2d 669, 673, 151 P. 2d 109.

A review of the applicable sections of the California Codes establishes this is a case in which alternative remedies are provided. Government Code, Section 11523, provides that judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure within 30 days after the last day on which reconsideration can be ordered (Govt. Code, Sec. 11523, amended by Stats. 1953, Chap. 962, Sec. 1; Stats. 1955, Chap. 246, Sec. 1). Section 1094.5 of the Code of Civil Procedure provides for judicial review by petition for a writ of mandate directly to the courts after a final decision by the administrative agency (Code Civ. Proc., Sec. 1094.5, added by Stats. 1945, Chap. 868, Sec. 1; amended by Stats. 1949, Chap. 358, Sec. 1).

Appeal to the Appeals Board is permissive, not mandatory, the applicable section provides that "any party aggrieved by a final decision of the department *may* appeal to the board from such decision." (Bus. and Prof. Code, Sec. 23081, added by Stats. 1954, First Ex. Sess., Chap. 20, Sec. 3, operative January 1, 1955.) The scope of review in California by the courts under Section 1094.5 of the Code of Civil Procedure (which has not been modified, altered or restricted) and by the Appeals Board under Section 23084 of the Business and Professions Code are identical (Bus. and Prof. Code, Sec. 23084, added by Stats. 1954, First Ex. Sess., Chap. 20, Sec. 3, operative January 1, 1955). Under the decision of the District Court of Appeal of the State of California, the licensee *must* appeal to the Appeals Board and then petition for writ of mandate in the court. There is a complete duplication of effort without statutory reason. The Board and the Court are required to go over the same record, resolve the same questions of jurisdiction and abuse of discretion and perform identical functions.

Petitioner here clearly complied with the requirements of Section 11523 of the Government Code of the State of California by requesting and paying for the transcript of the hearing and by filing its petition for writ of mandate in the court. Petitioner submits that the District Court of Appeal of the State of California, in the final decision in this case, has gone out of its way to require needless repetition of review of administrative decisions, in direct conflict with the expressed contrary intention of the legislature.

Petitioner has here been penalized by the courts of the State of California in following a judicial remedy established by statute. Petitioner has further been penalized

in first adhering to exhaustion of administrative remedies as required by the statutes and prior decisions of the courts of the State of California.

Conclusion.

This is a case of first impression relating to administrative procedure of the Department of Alcoholic Beverage Control. A hearing is necessary to settle important questions of law.

In decisions of the California courts prior to the instant case, the decision of the administrative agency has been reviewed on the merits to determine if there was an abuse of discretion in revoking the license.

Stoumen v. Reilly, 37 Cal. 2d 713, 234 P. 2d 969;

Szegle v. State Board of Equalization, 125 Cal. App. 2d 432, 270 P. 2d 518.

There has never been a review on the merits of the original decision of the hearing officer in this case revoking petitioner's license. The District Court of Appeal of the State of California has resolved substantial questions of administrative law in violation of the due process and equal protection of the laws clauses of the Constitution of the United States, apparently with one eye cocked on the social problem inherently existing in the present case. The sole basis for explaining the conduct of the administrative agency in this case in delaying notice of its decision and in refusing to prepare the transcript must be due to an antipathy and aversion to the social problem of homosexuality. Petitioner submits this is no basis on which to deny a person a review of the merits of an administrative decision.

Petitioner respectfully urges that the questions involved in this appeal reach far beyond the narrow limits of this case and present fundamental issues of administrative law and constitutional law.

Petitioner prays that the Writ of Certiorari be granted.

Respectfully submitted,

ROBERT M. MASLOW,
ALBERT E. ISENBERG,
DON LOWRY and
RONALD H. FREEMOND,
By ROBERT M. MASLOW,
Attorneys for Petitioner.

EXHIBIT A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Hollywood Circle, Inc., a corporation, Plaintiff and Appellant, vs. Department of Alcoholic Beverage Control of the State of California; Russell S. Munro, Director of the Department of Alcoholic Beverage Control of the State of California; Philip E. Davis, Area Administrator, Department of Alcoholic Beverage Control of the State of California; and Alcoholic Beverage Control Appeals Board of the State of California, Defendants and Respondents. Civil No. 22095.

Filed: Sep. 3, 1957.

Appeal from a judgment of the Superior Court of Los Angeles County, John J. Ford, Judge.

For Appellant: Albert E. Isenberg.

For Respondents: Edmund G. Brown, Attorney General, Edward M. Belasco, Deputy Attorney General.

March 22, 1956, the Department of Alcoholic Beverage Control of the State of California revoked the on-sale liquor license of Hollywood Circle, Inc., a corporation.

March 23rd, the order of revocation was mailed to Hollywood Circle.

April 20th, Hollywood Circle's petition for reconsideration was denied by the Department.

May 3rd, Hollywood Circle mailed its notice of appeal to the Appeals Board of the Department.

May 7th, the Appeals Board filed the notice of appeal.

The Appeals Board dismissed the appeal for lack of jurisdiction, because it was filed more than forty days after the Department mailed the order of revocation.

Hollywood Circle appeals from a judgment of the superior court, denying its petition for a writ of mandate to review the proceeding of the Board.

The first inquiry is whether or not the notice of appeal was filed in time.

Section 23081 of the Business and Professions Code provides in part, "Within 40 days after the decision of the department is delivered or mailed" an aggrieved party may appeal to the Appeals Board.

The Appeals Board is set up under the Constitution and Code as part of the administrative control of liquor sales in California. (Const., Art. XX, § 22; Bus. & Prof. Code, § 23075.)

Section 10 of the Civil Code provides that the time in which an act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

Computing the time from the date of mailing the decision—March 23rd—to the date of mailing the notice of appeal—May 3rd—results in forty-one days, eight in March, thirty in April, and three in May.

So here we have a case of first impression in California: Does the some strict rule that requires a notice of appeal to be filed within the time specified by law apply to an appeal to an appeal board of an administrative agency?

When an administrative remedy is provided by law, relief must first be sought from the administrative body,

and this remedy must be exhausted before the courts will act. (Temescal Water Co. v. Dept. Public Works, 44 Cal. 2d 90, 106, and cases cited.)

In the leading case of Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 292, Mr. Chief Justice Gibson, speaking for the Supreme Court, states the above rule; also that a court violating it acts in excess of jurisdiction; and also that administrative remedies are not exhausted until an administrative appeal, if the law provides for it, is fully prosecuted.

The general policy of our law is not unfavorable to judicial review of administrative proceedings. But it is the policy of our law that time limits for filing notices of appeal in all legal proceedings must be complied with literally and exactly. This is generally held to be a jurisdictional prerequisite. (*Cf.*, Estate of Hanley, 23 Cal. 2d 120; 3 Cal. Jur. 2d 653.)

This court can see no reason why appeals in administrative tribunals should be governed by any other rule.

Therefore, in this case, the administrative appeal was filed too late, the Appeals Board correctly held that it had no further jurisdiction over it, the Department's decision became final, and the courts have no jurisdiction to review the proceeding.

It is not necessary to this decision to consider whether the date of mailing the notice of appeal or of its filing by the Department fixes the time within which the law requires that it be filed. For no matter how we compute the time, Hollywood Circle is still outside the forty-day limit.

In passing, however, perhaps this should be said: While it is a matter of legislative concern primarily, it seems

to this court that in fairness time should be fixed by the date of mailing the notice of appeal, rather than by the date of filing it in the Department in Sacramento. Time starts from mailing the decision of Department. So why shouldn't it end with mailing the notice of appeal to the Appeals Board?

The time elapsed from mailing the notice of appeal in this case to its filing—May 3rd to May 7th—could have presented a close legal problem here. For a good old-time horse-drawn stage could have made it from Hollywood to Sacramento in four days.

Moreover, while our law as to time to file a notice of appeal is almost as rigid and unyielding as a Procrustean bed, it is not absolutely so. In some cases the courts may relieve an appellant from late filing of a notice of appeal, when the delay has not been his fault.

Now let's come back to the case.

Hollywood Circle argues:

1. The "final decision of the department" referred to in section 23081 of the Business and Professions Code includes the decision of the department on reconsideration.

2. Section 1013 of the Code of Civil Procedure is applicable to the forty-day period specified in section 23081.

3. Request and payment for the transcript of the record for review by the Appeals Board extends the time to appeal.

4. The trial court erred in sustaining the demurrer without leave to amend, denying petitioner at least one more chance to plead additional facts to state a cause of action.

5. The judgment must be reversed as the order of the Appeals Board on which the trial court relied in sustaining the demurrer, is invalid and ineffective under section 23086 of the Business and Professions Code.

6. Sections 11523 of the Government Code and 23086 of the Business and Professions Code are inconsistent, and Hollywood Circle had the right to petition for a writ of mandate without an appeal to the Appeals Board.

These arguments will be briefly mentioned.

1. The proceedings for reconsideration did not affect the time for filing the notice of appeal. Section 23080 of the Business and Professions Code provides that "decision" means "any determination of the department imposing a penalty assessment or affecting a license which may be appealed to the board under Section 22 of Article XX of the Constitution."

2. Section 1013 of the Code of Civil Procedure does not affect the time specified in section 23081 of the Business and Professions Code. The Appeals Board is a constitutional governmental body. (Bus. & Prof. Code, § 23075.) There appears to be no intent by the people in enacting the current liquor control laws in their Constitution, nor by the legislature in implementing them, to extend in any manner the time for filing a notice of appeal specified in section 23081 of the Business and Professions Code.

3. Request and payment for the transcript did not extend the time to file the notice of appeal.

4. It was not error for the superior court to sustain the demurrer without leave to amend. When it appears from a complaint that it cannot be amended to state a cause of action, it is not an abuse of discretion to sus-

tain a demurrer without leave to amend, even though it is interposed for the first time. (Temescal Water Co. v. Dept. Public Works, *supra*, 44 Cal. 2d 90, 107.)

5. The order of the Appeals Board was neither invalid nor ineffective under section 23086 of the Business and Professions Code. This section of the Code requires the Appeals Board to enter its order within sixty days after filing the appeal. May 7, 1956 the Board filed the appeal. July 12, 1956, it dismissed it. No appeal was perfected and the section is clearly not applicable.

6. Referring to Hollywood Circle's final contention that it had the right to appeal under Government Code, section 11523, without appealing to the Appeals Board of the Department of Alcoholic Beverage Control. Examination of the constitutional and code provisions as to liquor control refutes this contention. The applicable part of the Constitution is as follows: ". . . When any person aggrived thereby appeals from a decision of the department . . . revoking any license . . . the board shall review the decision subject to such limitations as may be imposed by the Legislature. (Const., Art. XX, § 22.)

Pursuant to this constitutional power, the legislature enacted section 23081 of the Business and Professions Code, with its requirement that an aggrieved person had forty days in which to appeal from a decision of the Department.

The judgment is affirmed.

DRAPEAU, *J. pro tem.*

We concur:

WHITE, *P. J.*

FOURT, *J.*

EXHIBIT B.

A. The California Constitution, Article XX, Section 22, amended on November 2, 1954:

"The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the States shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.

"All alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in premises which shall be licensed as provided by the Legislature. In providing for the licensing of premises, the Legislature may provide for the issuance of, among other licenses, licenses for the following types of premises where the alcoholic beverages specified in the licenses may be sold and served for consumption upon the premises:

"(a) For bona fide public eating places, as defined by the Legislature.

"(b) For public premises in which food shall not be sold or served as in a bona fide public eating place, but upon which premises the Legislature may permit the sale or service of food products incidental to the sale and service of alcoholic beverages. No person under the age of 21 years shall be permitted to enter and remain in any such premises without lawful business therein.

"(c) For public premises for the sale and service of beers alone.

"(d) Under such conditions as the Legislature may impose, for railroad dining or club cars, passenger ships, common carriers by air, and bona fide clubs after such clubs have been lawfully operated for not less than one year.

"The sale, furnishing, giving, or causing to be sold, furnished, or giving away of any alcoholic beverages to any person under the age of 21 years is hereby prohibited, and no person shall sell, furnish, give, or cause to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 years, and no person under the age of 21 years shall purchase any alcoholic beverage.

"The Director of Alcoholic Beverage Control shall be the head of the Department of Alcoholic Beverage Control, shall be appointed by the Governor subject to confirmation by a majority vote of all of the members elected to the Senate, and shall serve at the pleasure of the Governor. The director may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove the director from office for dereliction of duty or corruption or incompetency. The director may appoint three persons who shall be exempt from civil service, in addition to the person he is authorized to appoint by Section 4 of Article XXIV.

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its

discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

"The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor, subject to confirmation by a majority vote of all of the members elected to the Senate. Each member, at the time of his initial appointment, shall be a resident of a different county from the one in which either of the other members resides. The members of the board may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove any member from office for dereliction of duty or corruption or incompetency.

"When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature. In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the questions whether the Department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings

are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order.

"A concurrent resolution for the removal of either the director or any member of the board may be introduced in the Legislature only if five Members of the Senate, or 10 members of the Assembly, join as authors.

"Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of alcoholic beverages in bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and in bona fide clubs after such clubs have been lawfully operated for not less than one year, and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public, shall be licensed and regulated under the applicable provisions of the Alcoholic Beverage Control Act, insofar

as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and any bona fide clubs after such clubs have been lawfully operated for not less than one year, for the privilege of keeping, buying, selling, or otherwise disposing of alcoholic beverages, shall be the amounts prescribed as of the operative date hereof, subject to the power of the Legislature to change such fees.

"The State Board of Equalization shall assess and collect such excise taxes as are or may be imposed by the Legislature on account of the manufacture, importation and sale of alcoholic beverages in this State.

"The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of alcoholic beverages contained in the original packages, where such alcoholic beverages are not to be consumed on the premises where sold; and may provide for the issuance of all types of licenses necessary to carry on the activities referred to in the first paragraph of this section, including, but not limited to, licenses necessary for the manufacture, production, processing, importation, exportation, transportation, wholesaling, distribution, and sale of any and all kinds of alcoholic beverages.

"The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper.

"All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed.

"The provisions of this section shall be self-executing, but nothing herein shall prohibit the Legislature from enacting laws implementing and not inconsistent with such provisions.

"This amendment shall become operative on January 1, 1957. (Amended Nov. 2, 1954; Nov. 6, 1956.)"

B. Business and Professions Code.

§23049 Legislative intent. It is the intention of the Legislature in enacting this chapter to provide a governmental organization which will ensure a strict, honest, impartial, and uniform administration and enforcement of the liquor laws throughout the State.

§23051 Succession to powers, duties, purposes, responsibilities, and jurisdiction of State Board of Equalization. On and after January 1, 1955, the department shall succeed to all of the powers, duties, purposes, responsibilities, and jurisdiction now conferred on the State Board of Equalization under Section 22 of Article XX of the Constitution and this division, except the power to assess and collect such excise taxes as are or may be imposed by law on account of the manufacture, importation, and sale of alcoholic beverages in this State, which shall remain the exclusive power of the State Board of Equalization.

All other laws heretofore or hereafter applicable to the State Board of Equalization with respect to alcoholic beverages, except as to excise taxes, shall hereafter be construed to apply to the department.

Any license issued by the board and in effect on December 31, 1954, shall be deemed on and after January 1, 1955, to be a license of the department.

§23052 Application of Gov C Tit 2 Div 3 Pt 1 Ch 2. The provisions of Chapter 2, Part 1, Division 3, Title 2 of the Government Code shall govern and apply to the conduct of the department in every respect the same as if such provisions were herein set forth at length, and wherever in that chapter the term "head of the department" or similar designation occurs, for the purposes of this section it shall mean the director.

§23075 Creation of board: Appointment of members: Compensation. There is in the State Government an Alcoholic Beverage Control Appeals Board, the members of which shall be appointed and shall serve as provided in Section 22 of Article XX of the Constitution, and shall receive an annual salary as provided for by Chapter 6 of Part 1 of Division 3 of Title 2 of the Government Code.

§23080 "Decision" defined. As used in this article "decision" means any determination of the department imposing a penalty assessment or affecting a license which may be appealed to the board under Section 22 of Article XX of the Constitution.

§23081 Time for filing appeal: Procedure. Within 40 days after the decision of the department is delivered or mailed to the parties, any party aggrieved by a final decision of the department may appeal to the board from such decision. The appeal shall be in writing and shall state the grounds upon which a review is sought. A copy of the appeal shall be mailed by the appellant to each party who appeared in the proceeding before the department, including the department which shall thereafter be treated in all respects as a party to the appeal.

§23082 When decision effective. No decision of the department shall become effective during the period in which an appeal may be filed and the filing of an appeal shall stay the effect of the decision until such time as a final order is made by the board.

§23083 Determination of appeal by board: Basis: Appearance of appellant: Evidence to be considered. The board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties. If any party to the appeal requests the right to appear before the board, the board shall fix a time and place for argument. The board shall not receive any evidence other than that contained in the record of the proceedings of the department.

§23084 Questions to be considered by board on review. The review by the board of a decision of the department shall be limited to the questions:

(a) Whether the department has proceeded without, or in excess of, its jurisdiction.

(b) Whether the department has proceeded in the manner required by law.

(c) Whether the decision is supported by the findings.

(d) Whether the findings are supported by substantial evidence in the light of the whole record.

(e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

§23085 Remanding of matter to department for reconsideration: rounds: Reversal of decision: Effect. In appeals where the board finds that there is

relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department.

§23086 Order: Time for entering. In all cases, the board shall enter its order within 60 days after the filing of an appeal.

§23090 Final order to be in writing: Delivery of copies to parties: Effect. A final order of the board on appeal from a decision shall be in writing, and copies thereof shall be delivered to the parties personally or sent to them by registered mail. The order shall be final upon its delivery or mailing, and no reconsideration or rehearing shall be permitted.

§23091 Same: Manner of judicial review: Time for filing action. Final orders of the board shall be subject to judicial review as prescribed by law. Where any statute specifies a limited period within which an action for judicial review of any matter within the jurisdiction of the board may be instituted, the time for filing the action shall commence to run on the date on which the final order of the board is delivered to the parties personally or sent to them by registered mail.

§24300 Where to be held: Conduct: Powers of department. Any hearings held on a protest, accusation, or petition for a license shall be held at the county seat of the county in which the premises or licensee are located; provided, that hearings before the department itself on reconsideration or under subdivision (c) of Section 11517 of the Government Code may be held in Sacramento or at any other place in the State where the department is meeting. Except as provided in Section 24203 and in this section, the proceedings shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and in all cases the department shall have all the powers granted therein.

§24301 Rulings, etc., of department subject to review. Subject to the provisions of Section 22 of Article XX of the Constitution, any ruling, order, or decision of the department is subject to review as provided by law in any court of competent jurisdiction in the county in which the person affected resides.

§25750 Rules and regulations. The department shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX of the Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that section or by this division, not inconsistent with any of the provisions of any statute of this State, including particularly the provisions of this division and the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code.

§25751 Power of department. For the performance of its duties the department has the power conferred

by Sections 11180 to 11191, inclusive, of the Government Code.

§25760 Manner of giving notice of act of department. Notice of any act of the department required by this division to be given may be signed and given by the director or an authorized employee of the department and may be made personally or by mail. If made by mail, service shall be made in the manner prescribed by Section 1013 of the Code of Civil Procedure. In case of service by mail, the service is complete at the time of deposit in the United States Post Office.

C. GOVERNMENT CODE:

§11500 Definitions. In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions and officers enumerated in Section 11501 and those to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

(b) "Party" includes the agency, the respondent and any person, other than an officer or an employee of the agency in his official capacity, who has been allowed to appear in the proceeding.

(c) "Respondent" means any person against whom an accusation is filed pursuant to Section 11503 or against whom a statement of issues is filed pursuant to Section 11504.

(d) "Hearing officer" means a hearing officer qualified under Section 11502.

(e) "Agency member" means any person who is a member of any agency to which this chapter is applicable and includes any person who himself constitutes an agency.

§11501 Extent to which procedure conducted pursuant to chapter: Agencies included. (a) The procedure of any agency shall be conducted pursuant to the provisions of this chapter only as to those functions to which this chapter is made applicable by the statutes relating to the particular agency.

(b) The enumerated agencies referred to in Section 11500 are:

Board of Dental Examiners of California.

Board of Medical Examiners of the State of California.

Board of Osteopathic Examiners of the State of California.

Board of Nurse Examiners of the State of California.

State Board of Optometry.

California State Board of Pharmacy.

State Department of Public Health.

State Board of Public Health.

Board of Examiners in Veterinary Medicine.

State Board of Accountancy.

California State Board of Architectural Examiners.

State Board of Barber Examiners.

State Board of Registration for Civil and Professional Engineers.

Registrar of Contractors.

State Board of Cosmetology.
State Board of Funeral Directors and Embalmers.
Structural Pest Control Board.
Yacht and Ship Brokers Commissioner.
Director of Professional and Vocational Standards.
State Collection Agency Board.
State Fire Marshal.
State Mineralogist.
Director of Agriculture.
Labor Commissioner.
Real Estate Commissioner.
Commissioner of Corporations.
Department of Social Welfare.
Social Welfare Board.
Department of Mental Hygiene.
Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun.
Board of Pilot Commissioners for Humboldt Bay and Bar.
Board of Pilot Commissioners for the Harbor of San Diego.
Fish and Game Commission.
State Board of Education.
Insurance Commissioner.
Savings and Loan Commissioner.
State Board of Dry Cleaners.
Board of Social Work Examiners of the State of California.
State Board of Chiropractic Examiners.
State Board of Guide Dogs for the Blind.
California Aeronautics Commission.

Board of Administration, State Employees' Retirement System.

Department of Motor Vehicles.

Bureau of Furniture and Bedding Inspection.

Cemetery Board.

State Water Pollution Control Board.

Regional Water Pollution Control Board.

Department of Natural Resources.

Department of Water Resources acting pursuant to Section 414 of the Water Code.

Board of Vocational Nurse Examiners of the State of California.

Certified Shorthand Reporters Board.

Bureau of Private Investigators and Adjusters.

California State Board of Landscape Architects.

Department of Alcoholic Beverage Control.

California Horse Racing Board.

§11521 Reconsideration. (a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision of such date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If no action is taken on a petition within the time allowed for ordering reconsideration the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the

record and such additional evidence and argument as may be permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself no agency member may vote unless he heard the evidence.

§11523 Judicial review: By mandamus: Time for petition: Reconsideration petition unnecessary: Preparation of record: Extension of time. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. Except as otherwise provided in this section any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days after a request therefor by him, upon the payment of the fee specified in Section 69950 of the Government Code as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part

of the record the time within which a petition may be filed shall be extended until five days after its delivery to him. The agency may file with the court the original of any document in the record in lieu of a copy thereof.

§11524 Continuances: Requirement of good cause. The agency may grant continuances. When a hearing officer of the Division of Administrative Procedure has been assigned to such hearing, no continuance may be granted except by him for good cause shown.

D. Code of Civil Procedure.

§1013 (Same: How made: When complete: Extension of time for exercise of right or doing act.) In case of service by mail, the notice or other paper must be deposited in the United States post office, or a mail box, sub-post office, substation, or mail chute, or other like facility regularly maintained by the Government of the United States, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence. The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day, together with one day additional for every full 100 miles distance between the place of deposit and the place of address, if served by different post offices, but such extension shall not exceed thirty days in all.

§1094.5 (Inquiry into validity of administrative order or decision.) (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines

that the findings are not supported by substantial evidence in the light of the whole record.

(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

(e) The court shall enter judgment either commending respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(f) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such notice whichever occurs first; provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be

stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.

EXHIBIT C.

Before the Alcoholic Beverage Control Appeals Board of the State of California.

In the Matter of the Accusation of Philip E. Davis, Area Administrator against Hollywood Circle, Inc. 6747 Hollywood Blvd. Los Angeles, California under the Alcoholic Beverage Control Act. File No. 48645; AB-304.

Time of Hearing: May 23, 1956 2:00 p. m.

Place of Hearing: Mirror Bldg., Los Angeles.

Appearances: For the Dept. of Alcoholic Beverage Control: The Honorable Edmund G. Brown, Attorney General: Leo J. Vander Lans, Deputy Attorney General. For the Appellant: Albert E. Isenberg, Esq., City National Bank Building, Beverly Hills, California.

Decision

Appellant, Hollywood Circle Inc., as of the 7th day of May, 1956, filed with this Board its notice of appeal from an adverse decision by the Department of Alcoholic Beverage Control. The decision of the Department of Alcoholic Beverage Control was mailed to appellant on the 23rd day of March, 1956, and the Department of Alcoholic Beverage Control under date of May 9, 1956, has moved to dismiss the appeal of the appellant herein upon the ground that this Board does not have jurisdiction to entertain it. The motion came on regularly for hearing on the 23rd day of May, 1956, at the hour of 2 o'clock p. m., in Room 918, Mirror Bldg., Los Angeles, California, and after argument was submitted for decision.

Appellant admits that its notice of appeal was filed more than forty days after the mailing of the department's decision to it but argues in opposition to the motion:

"(1) That the forty day period should run from the time the decision was received by appellant, not from the date of mailing.

"(2) That the appeal was filed in time under provisions of Section 1013 of the Code of Civil Procedure.

"(3) That the time to file a notice of appeal was stayed through the filing of a petition for reconsideration."

The issues raised by appellant have been considered and disposed of in the appeals of Obedience, AB-84; appeal of Isaac, AB-267; appeal of Kovacs, AB-205; and appeal of Damanti, AB-306. What we said in the appeals noted we adopt as the law of this case.

The appeal in the present proceeding is hereby dismissed for want of jurisdiction.

* * * * * * * *

It Is Hereby Certified That on July 12, 1956 the Alcoholic Beverage Control Appeals Board Adopted the Above Decision.

Sacramento, California

Dated: July 13, 1956

RUSSELL H. MATHER
Russell H. Mather
Assistant to Appeals Board

State of California, County of Los Angeles—ss.

June D. Judson, being first duly sworn, deposes and says:

That she is a citizen of the United States, resident of Los Angeles County, over eighteen years of age, not a party to the within cause, and employed as a clerk in the Los Angeles office of the Attorney General of the State of California, who is one of the attorneys for Respondents in the above entitled matter; that Albert E. Isenberg and Don Lowry appear in said cause as attorneys for Petitioner and have offices at 401 City Natl. Bank Bldg., Beverly Hills, California; that in each of said places there is delivery service by United States mail, and between said two places there is regular communication by mail; that affiant enclosed a copy of Demurrer in an envelope addressed to said Albert E. Isenberg and Don Lowry, 401 City Natl. Bank Bldg., Beverly Hills, California; that affiant sealed said envelope and deposited the same in the United States Post Office at Los Angeles, California, on the 30th day of July, 1950, with postage thereon fully prepaid.

JUNE D. JUDSON.

Subscribed and sworn to before me this 30th day of July, 1950.

EDWARD G. BROWN,
Attorney General of the State of California.

By EDWARD M. BELASCO,
Deputy Attorney General.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 758

HOLLYWOOD CIRCLE, INC., a corporation,

Petitioner and Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; RUSSELL S. MUNRO, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; PHILIP E. DAVIS, AREA ADMINISTRATOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Defendants and Respondents.

PETITIONER'S REPLY BRIEF.

ROBERT M. MASLON,
ALBERT E. ISENBERG,
DON LOMPA, and
RONALD H. FREEMONT,
301 City National Bank Bldg.
304 North Rodeo Drive,
Beverly Hills, California

SUBJECT INDEX

PAGE

I.

The petition for writ of certiorari in this cause was timely filed 1

A. Statement of facts relating to filing of petition..... 1

B. The finality of judgments of the District Court of Appeal of the State of California is governed by the Constitution of the State of California..... 2

C. Decisions of the Supreme Court of the State of California are governed by Rules on Appeal and become final thirty days after filing..... 3

D. The decision of the District Court of Appeal was not a "final judgment" within the meaning of the Judicial Code, Sec. 237 (28 U. S. C., Sec. 344(a)), until the expiration of sixty days from the date of filing..... 5

II.

Reply to respondents' statement of the case..... 6

Appendix:

Exhibit "A." Letter, dated November 22, 1957, to Clerk of the Supreme Court from Don Lowry.....App. p. 1

Exhibit "B." Letter, dated November 25, 1957, to Don Lowry from Clerk of the Supreme Court.....App. p. 2

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Market St. Ry. Co. v. Railroad Commission of California, 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770	5
Moran v. District Court of Appeal, 15 Cal. 2d 527, 102 P. 2d 1079	5
People v. District Court of Appeal, 193 Cal. 19, 222 Pac. 353	5
People v. Walker, 76 Cal. App. 192, 244 Pac. 94	3
Scoville v. Keglor, 29 Cal. App. 2d 66, 84 P. 2d 212	3

RULES

Amendments to Rules on Appeal adopted by the Judicial Council of the State of California, effective January 1, 1957	3
Rules on Appeal of the Supreme Court and District Courts of Appeal of the State of California, Rule 24(a)	3, 5

STATUTE

California Constitution, Art. VI, Sec. 4c	2, 3

TEXTBOOK

17 Southern California Law Review (1944), p. 248 et seq., Witkin, New California Rules on Appeal	4

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Defendants and Respondents.

PETITIONER'S REPLY BRIEF.

Pursuant to leave of Court first and obtained, petitioner does hereby file its reply brief in this cause.

I.

The Petition for Writ of Certiorari in This Cause Was Timely Filed.

A. Statement of Facts Relating to Filing of Petition.

The District Court of Appeal of the State of California affirmed the judgment of the lower court in this cause on September 3, 1957. The District Court denied a rehearing

on September 25, 1957. The Supreme Court denied a hearing on October 30, 1957. Under the Constitution of the State of California, Article VI, Section 4c, the judgment of the District Court of Appeal became final sixty days after September 3, 1957, on November 2, 1957. The remittitur issued from the District Court of Appeal on November 4, 1957.

The petition for writ of certiorari was filed on January 30, 1958.

B. The Finality of Judgments of the District Court of Appeal of the State of California Is Governed by the Constitution of the State of California.

The California Constitution, Article VI, Section 4c, provides as follows:

> "The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a district court of appeal and to order any cause pending before a district court of appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within fifteen days in criminal cases, or thirty days in all other cases, after such judgment shall have become final therein. The judgment of the district court of appeal shall become final therein upon the expiration of fifteen days in criminal cases, or thirty days in all other cases, after the same shall have been pronounced.
>
> "The Supreme Court shall have power to order causes pending before a district court of appeal for one district to be transferred to the district court of appeal for another district, or from one division thereof to another for hearing and decision."

In accordance with the constitutional provision, a decision of the District Court of Appeal of the State of California, only becomes final upon the expiration of a period of sixty days from the date it is filed. The decision does not become final as to the rights of the parties until after the expiration of this period, whereupon the remittitur issues.

Scoville v. Keglor (1938), 29 Cal. App. 2d 66, 67, 84 P. 2d 212;

People v. Walker (1926), 76 Cal. App. 192, 200, 244 Pac. 94.

C. Decisions of the Supreme Court of the State of California Are Governed by Rules on Appeal and Become Final Thirty Days After Filing.

The California rules on appeal expressly provide that a decision of the Supreme Court of the State of California becomes final thirty days after filing unless otherwise ordered prior to the expiration of said thirty-day period.

Rule 24(a), Rules on Appeal of the Supreme Court and District Courts of Appeal of the State of California, effective July 1, 1943. (See 22 Cal. 2d 1.)

Amendments to Rules on Appeal adopted by the Judicial Council of the State of California, effective January 1, 1957. (See 47 Cal. 2d 1.)

There is no provision in the Constitution of the State of California applicable to decisions of the Supreme Court comparable to Article VI, Section 4c, which applies to the District Courts of Appeal.

Rule 24(a) states the time when decisions of the reviewing courts become final. This rule is complicated by the partial coverage of the Constitution which establishes

a difference between the rules applicable to the Supreme Court and District Courts of Appeal.

For discussion of this difference in the rules, see Witkin, New California Rules on Appeal (1944), 17 So. Calif. L. Rev. 248, *et seq.*

In view of the application of the Constitution as to finality of decisions solely to the District Courts of Appeal, petitioner, on November 22, 1957, wrote to the Clerk of the Supreme Court, requesting the date on which the decision in this cause became final. A copy of petitioner's letter is attached hereto marked Exhibit "A" and made a part hereof by reference.

The Clerk of the Supreme Court replied on November 25, 1957, advising that the decision of the District Court of Appeal became final sixty days after September 3, 1957. The Clerk did not advise as to when the ninety-day period to file the petition for writ of certiorari expired. A copy of said letter is attached hereto marked Exhibit "B" and made a part hereof by reference.

It should be noted that as stated by the Clerk of the Supreme Court of California, this case never became the Supreme Court's case. The final decision in this case was that of the District Court of Appeal, which under the Constitution of the State of California became final on November 2, 1957. The petition for writ of certiorari was filed on January 30, 1958, within the ninety-day period. The denial of a hearing by the Supreme Court on October 30, 1957, does not affect the constitutional provision requiring the expiration of sixty days to make the decision of the District Court of Appeal final. The Supreme Court has the right, within said period, to reverse itself and order a hearing.

D. The Decision of the District Court of Appeal Was Not a "Final Judgment" Within the Meaning of the Judicial Code, Section 237 (28 U. S. C., Sec. 344(a)), Until the Expiration of Sixty Days From the Date of Filing.

The decisions of the courts of the State of California disclose that judgments of the district courts of appeal do not become final until the expiration of thirty days after the same have been pronounced or filed.

Moran v. District Court of Appeal (1940), 15 Cal. 2d 527, 102 P. 2d 1079;

People v. District Court of Appeal (1924), 193 Cal. 19, 222 Pac. 353.

In *Market Street Railway Co. v. Railroad Commission of California*, 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770, the court reviewed Rule 24(a) as applied to decisions of the Supreme Court of the State of California. The Supreme Court had rendered a decision and had denied a rehearing in that case. Rule 24(a) was clearly applicable. The court did not consider, however, the effect of the Constitution of the State of California as applied to decisions of the District Courts of Appeal. No such action was involved.

Petitioner submits that this case never became the Supreme Court's case, and that, therefore, the final decision is that of the District Court of Appeal. That decision became final under the Constitution of the State of California on November 2, 1957.

Petitioner relied upon the Constitution of the State of California and upon the advice of the Clerk of the Supreme Court that the decision of the District Court of Appeal became final after sixty days in filing this petition for writ of certiorari on January 30, 1958. Respondents have

not questioned the timely filing of petition for writ of certiorari in their opposing brief. Petitioner submits the petition was timely filed.

II.

Reply to Respondents' Statement of the Case.

Respondents, in their opposing brief, state as follows:

> "A hearing on the accusation was held before a hearing officer who found seven separate instances where men on petitioner's premises solicited acts of homosexual intercourse with police officers, one of which instances included the touching of the police officer's private parts" (Resp. Opposing Br. p. 5, lines 8-13).

The sole question involved here is one of due process of law. Respondents' gratuitous statement as to the facts can only be for the purpose of creating an atmosphere of prejudice towards petitioner, with regard to the constitutional issue here present.

Petitioner agrees that homosexuality is a social and educational problem of importance to the community. The fact remains, the hearing officer in this case permitted incompetent testimony as to any acts outside of petitioner's premises and unknown to petitioner, which resulted in the revocation of petitioner's license.

Petitioner requests the Court to consider the constitutional issue here present on the grounds stated in the petition for writ of certiorari filed in this cause.

Respectfully submitted,

ROBERT M. MASLOW,
ALBERT E. ISENBERG,
DON LOWRY, and
RONALD H. FREEMOND,
Attorneys for Petitioner.

EXHIBIT "A."

November 22, 1957

Mr. William I. Sullivan
Clerk of the Supreme Court
State Building
San Francisco, California

Re: Hollywood Circle vs. Department of Alcoholic Beverage Control Second Civil No. 22095

Dear Sir:

It is our intention to file a petition for writ of certiorari with the Supreme Court of the United States. We should appreciate your advising the date on which the decision in the above entitled cause became final, and the last day to file the petition for writ of certiorari with the Supreme Court.

Your attention to this matter is sincerely appreciated.

Very truly yours,
DON LOWRY

DL:is

EXHIBIT "B."

San Francisco 2
315 State Building

Office of the Clerk
SUPREME COURT OF CALIFORNIA
William I. Sullivan, Clerk
November 25, 1957

Messrs. Fendler, Lerner & Lowry
Attorneys at law
333 So. Beverly Drive
Beverly Hills, California

Attention: Mr. Don Lowry

Re: 2 Civ. 22095—Hollywood Circle vs. Department of Alcoholic Beverage Control

Gentlemen:

Our records disclose that the District Court of Appeal of the Second Appellate District affirmed the judgment in the above case on September 3, 1957; that that court denied a rehearing on September 25, 1957; that this court denied a hearing in the case on October 30, 1957; and that the remittitur issued from the District Court of Appeal on November 4, 1957.

Inasmuch as this court denied a hearing the case never became our case and it is suggested that you communicate with the District Court of Appeal. Under the Rules on Appeal a decision of the District Court of Appeal becomes final in 60 days. As you know, a Petition for Writ of Certiorari or a Notice of Appeal to the Supreme Court of the United States may be filed within 90 days. I am not in a position to advise you as to when the 90-day period expires.

Very truly yours,
/s/ William I. Sullivan
William I. Sullivan
Clerk of the Supreme Court

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Office - Supreme Court, U.S.
FILED
FEB 20 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957
No. 758

HOLLYWOOD CIRCLE, INC., a Corporation,
Petitioner and Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California; RUSSELL S. MUNRO, Director of the Department of Alcoholic Beverage Control of the State of California; PHILIP E. DAVIS, Area Administrator, Department of Alcoholic Beverage Control of the State of California; and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the State of California,
Defendants and Respondents.

RESPONDENTS' OPPOSING BRIEF

EDMUND G. BROWN,
Attorney General,
EIMO G. FUNKE,
Assistant Attorney General,
EDWARD M. BELASCO,
Deputy Attorney General,
600 State Building,
Los Angeles 12, California,
Attorneys for Respondents.

SUBJECT INDEX

PAGE

Jurisdiction 1

A. Opinion below 1

B. Absence of grounds of jurisdiction 2

Laws involved 2

Issues involved 3

Statement of the case 4

Argument 7

I.

There is no federal question here involved 7

II.

California follows the rule of the federal courts requiring a timely appeal 9

Conclusion 14

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Abelleira v. District Court of Appeal, 17 Cal. 2d 280	7
Di Prospero v. Commissioner of Internal Revenue, 176 F. 2d 76	12
Dolezilek v. Commissioner of Internal Revenue, 212 F. 2d 458	13
Fiscus v. Dept. of Alcoholic Beverage Control, 155 A. C. A. 271	7
Kiker v. Commissioner of Internal Revenue, 218 F. 2d 389	13
Lewis-Hall Iron Works v. Blair, 23 F. 2d 972, cert. den. 277 U. S. 592, 48 S. Ct. 529, 72 L. Ed. 1004	10, 12
Louisiana Discount Corporation v. Commissioner of Internal Revenue, 193 F. 2d 495	11
Lynn v. Duckel, 46 Cal. 2d 845	7
Poynor v. Commissioner of Internal Revenue, 81 F. 2d 521	11, 12
Stebbins' Estate of Helvering, 121 F. 2d 892	12
Temescal Water Co. v. Dept. of Public Works, 44 Cal. 2d 90	7
United States v. Lombardo, 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897	11
Van De Veer v. Dept. of Alcoholic Beverage Control, 155 A. C. A. 933	7, 13

STATUTES

California Business and Professions Code, Secs. 23000-25762	4
California Business and Professions Code, Sec. 23081	2, 4, 7
California Constitution, Art. XX, Sec. 22	2, 4
Government Code, Sec. 11521a	9
Internal Revenue Code of 1954, Sec. 6213(a)	9
United States Code Annotated, Title 26, Sec. 6213	9
United States Constitution, Fourteenth Amendment	2

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RESPONDENTS' OPPOSING BRIEF

Jurisdiction

A. Opinion Below

Petitioner seeks a review of a final decision of the District Court of Appeal of the State of California, Second Appellate District, Division One, which affirmed a judgment of the Superior Court of the State of California, in and for the County of Los Angeles. The decision is reported in 153 Advance California Appellate Reports 576, 314 P. 2d 1007.

B. Absence of Grounds of Jurisdiction

The District Court of Appeal construed the provisions of Section 23081, of the California Business and Professions Code and determined that the time limits for filing notices of appeal in all legal proceedings must be complied with exactly as a jurisdictional prerequisite, and that this rule of procedural law applied to appeals to administrative tribunals as well as appeals to reviewing courts. Respondents submit that this decision does not affect the legal rights of petitioner arising under the due process clause or the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States, nor does this decision conflict with decisions in other cases.

Laws Involved

Section 22 of Article XX of the California Constitution and the applicable provisions of the California Government Code and the California Business and Professions Code are set forth in the petition at pages 7 to 25 of the Appendix.

For illustrative purposes respondents here recite the provisions of Section 23081 of the California Business and Professions Code:

> "Within 40 days after the decision of the department is delivered or mailed to the parties, any party aggrieved by a final decision of the department may appeal to the board from such decision. The appeal shall be in writing and shall state the grounds upon which a review is sought. A copy of the appeal shall be mailed by the appellant to each party who appeared in the proceeding before the department, including the department which shall thereafter be treated in all respects as a party to the appeal."

Issues Involved

This case concerns the appellate procedure in a review of a decision of the California administrative agency charged with enforcing the liquor laws of California. The issue was succinctly posed by the District Court of Appeal in its decision in the following words:

> "Does the same strict rule that requires a notice of appeal to be filed within the time specified by law apply to an appeal to an appeal board of an administrative agency?"

A subordinate question is whether an appellant who fails to perfect his appeal can complain that his appeal was dismissed and not heard on the merits.

The District Court of Appeal in its decision disposed of these issues by holding:

> "The general policy of our law is not unfavorable to judicial review of administrative proceedings. But it is the policy of our law that time limits for filing notices of appeal in all legal proceedings must be complied with literally and exactly. This is generally held to be a jurisdictional prerequisite. (*Cf., Estate of Hanley*, 23 Cal. 2d 120 [142 P. 2d 423, 149 A. L. R. 1250], 3 Cal. Jur. 2d 653.)
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> "This court can see no reason why appeals in administrative tribunals should be governed by any other rule.
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> "Therefore, in this case, the administrative appeal was filed too late, the Appeals Board correctly held that it had no further jurisdiction over it, the department's decision became final, and the courts have no jurisdiction to review the proceeding."

Statement of the Case

The respondent Department of Alcoholic Beverage Control, hereinafter referred to as "Department," is the administrative agency empowered under the provisions of Section 22 of Article XX of the Constitution of the State of California to license the manufacture, importation and sale of alcoholic beverages in California and to deny, suspend or revoke any specific liquor license if the Department determines for good cause that the granting or continuance of such license would be contrary to public welfare and morals. The Legislature of California has provided in the Alcoholic Beverage Control Act (Secs. 23000 to 25762 of the California Business and Professions Code) that these constitutional duties exercised by the Department may be reviewed through administrative proceedings, followed by an administrative appeal and then resort to the courts. A decision of the Department following an administrative hearing is first reviewable by the Alcoholic Beverage Control Appeals Board, hereinafter referred to as "Appeals Board" which is the administrative appellate body designated in Section 22 of Article XX of the California Constitution as the tribunal from which aggrieved liquor licensees must seek relief before applying to the superior court for judicial review through an application for the issuance of a writ of mandate. A licensee aggrieved by a decision of the Department invokes the jurisdiction of the Appeals Board through filing an appeal to that body pursuant to the provisions of Section 23081 of the California Business and Professions Code. This section provides that an appeal to the Appeals Board may be taken by an aggrieved person within 40 days after the decision of the Department

is delivered or mailed to the parties to the administrative proceeding before the Department.

In the case at bar an accusation was filed with the Department charging petitioner with allowing its premises to be used as a place to which persons resorted for purposes contrary to public welfare and morals, particularly as a place in which persons met, engaged in, or solicited lewd or lascivious homosexual acts. [Clk. Tr. p. 45.] A hearing on the accusation was held before a hearing officer who found seven separate instances where men on petitioner's premises solicited acts of homosexual intercourse with police officers, one of which instances included the touching of the police officer's private parts. The hearing officer in his proposed decision found that grounds existed under the provisions of the Alcoholic Beverage Control Act to suspend or revoke petitioner's liquor license, and recommended as a penalty that the license be revoked. [Clk. Tr. p. 3.]

Petitioner filed a petition for reconsideration, which was denied by the Department on April 20, 1956, and notice of this denial was received by petitioner on May 2, 1956. [Clk. Tr. p. 5.]

On May 3, 1956, 41 days after March 23, 1956, the day on which the Department mailed its decision, petitioner mailed its notice of appeal to the Appeals Board. This notice was received and filed by the Appeals Board on May 7, 1956 [Clk. Tr. pp. 5, 20], a total of 45 days after the Department mailed petitioner the decision revoking its liquor license. [Clk. Tr. p. 13.] The Department moved to dismiss the appeal upon the ground that it was filed beyond the forty-day statutory period in which appeals could be filed and the Appeals Board was with-

out jurisdiction to consider the appeal. [Clk. Tr. p. 6, 20.] The motion was granted and the appeal was dismissed. [Clk. Tr. pp. 20-21.]

Petitioner then filed in the Superior Court a petition for a writ of mandate directing the Department and the Appeals Board to reverse their decisions. [Clk. Tr. pp. 1-9.] Respondents filed a general demurrer to the petition for writ of mandate [Clk. Tr. pp. 11-19], and the demurrer was sustained without leave to amend. [Clk. Tr. p. 22.] Judgment was rendered in favor of respondents. [Clk. Tr. pp. 23-24.]

Petitioner next filed an appeal with the District Court of Appeal of California and on September 3, 1957, the court rendered its decision affirming the judgment of the Superior Court. On September 25, 1957, the District Court of Appeal denied a rehearing.

Petitioner applied to the Supreme Court of California for a hearing and the application was denied on October 30, 1957. The minutes of that court set forth in 49 Advance California Reports (Min. p. 3) indicate that only one justice of the seven voted for a hearing; there was no "split decision" as alleged by petitioner at page 2 of the petition for writ of certiorari herein.

ARGUMENT

I.

There is No Federal Question Here Involved

It has been firmly established in California that when an administrative remedy is provided by law relief must first be sought from the administrative body, and this remedy must be exhausted before the courts will act.

Lynn v. Duckel, 46 Cal. 2d 845;

Temescal Water Co. v. Dept. of Public Works, 44 Cal. 2d 90;

Abelleira v. District Court of Appeal, 17 Cal. 2d 280.

In the case of *Fiscus v. Dept. of Alcoholic Beverage Control,* 155 Advance California Appellate Reports 271, it was held that the rule of exhaustion of administrative remedies applied to appeals from the Department to the Appeals Board. In the case of *Van De Veer v. Department of Alcoholic Beverage Control,* 155 Advance California Appellate Reports 933, the court below reaffirmed its decision in the case at bar and again held that failure to perfect the administrative appeal within the forty-day period required by law was fatal to the appeal and divested the Appeals Board of jurisdiction in the matter. In its opinion (at p. 937) the District Court of Appeal succinctly analyzed the legal effect of the provisions of Section 23081 of the California Business and Professions Code upon those aggrieved litigants who desired to appeal.

The statement of the court, which totally refutes all contentions of the petitioner, is the following:

> "The Legislature, under the constitutional provisions heretofore related, has the power to impose such limitations as it desires. The Legislature has acted

and has provided (1) the appeal must be in writing; (2) the appeal must state the grounds upon which the review is sought; (3) a copy of the appeal must be mailed to each party including the Department, and (4) the appeal must be taken within 40 days after the Department's decision is delivered or mailed to the parties (Bus. & Prof. Code, §23081), and the appeal must be determined only on the record and on briefs filed by the parties, who have the right to present oral argument (Bus. & Prof. Code, §23083). In adopting the law as now written, the Legislature very properly provided that the time for filing an appeal begins to run upon the commencement of an official act by an agency of the state, namely when the Department either mails out its decision or personally serves it on the party concerned, thereby placing it beyond the control of some licensees to delay and delay by claiming they never received the notice, or claiming they received it later than it was actually received, and thereby placing the burden upon the Appeals Board to determine on each occasion just when, if ever, such a notice was received. If the present law is too severe, and we do not mean to imply that it is, it is the province of the legislature to change it and it is not our right to do so by judicial decree."

Respondents submit that this interpretation of the duties imposed upon parties to a state administrative proceeding does not warrant review by this Honorable Court on certiorari since the interpretation is reasonable and just and does not conflict with any Federal law.

The contention of petitioner that its appeal to the Department for reconsideration of the original decision extended or affected its time for filing an appeal to the Appeals Board is also entirely without merit and presents

no Federal question. The court below disposed of the argument by stating that the proceedings for reconsideration did not affect the time for filing notice of appeal since the decision from which the appeal must be filed is the original decision of the Department. This holding conforms with the provisions of Section 11521a of the Government Code covering reconsiderations by administrative bodies in California, for a reading of that statute makes it clear that a new decision of the administrative agency arises only in those instances when reconsideration has been granted and the case is heard anew. The granting of reconsideration obviously sets aside the original decision, but whenever reconsideration is denied, as in the case at bar, the original decision stands.

Petitioner as one who omitted to follow the constitutional and statutory provisions covering a review of the quasi-judicial decisions of a statewide administrative agency has no standing before this Honorable Court in seeking relief from its own fault.

II.

California Follows the Rule of the Federal Courts Requiring a Timely Appeal

The attention of this Honorable Court is directed to a series of cases holding that the timely filing of a notice of appeal is a jurisdictional requirement in tax cases. Section 6213(a) of the 1954 Internal Revenue Code (26 U. S. C. A. §6213) similar in form and content to its predecessor sections provides as follows:

> "Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in Section 6212 is mailed (not

counting Saturday, Sunday or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. . . ."

In interpreting this provision of law the United States Court of Appeals has consistently held that unless the taxpayer officially files his appeal to the reviewing tribunal within the statutory period, the appeal must be dismissed upon a jurisdictional basis. In the case of *Lewis-Hall Iron Works v. Blair,* 23 F. 2d 972, 974 (writ of certiorari denied by this Honorable Court, 277 U. S. 592; 48 Sup. Ct. 529; 72 L. Ed. 1004), the taxpayer seeking redetermination dispatched by special delivery to the Board of Tax Appeals a petition which was deposited by a post officer messenger in the mail slot of the Board two hours and forty minutes after its official closing time on the last day of the statutory period in which to file an appeal. The petition was found the next morning and stamped as of that date. In its opinion upholding the Board's dismissal of the petition the court states:

"'The controlling question at present is whether this deposit of the petition constituted a filing of it within the law. This question must be answered in the negative, for it is well established that in general a paper is not "filed", within contemplation of law, until it is delivered to the proper officer to be filed by him.

"'A paper is said also to be filed when it is delivered to the proper officer, and by him received to be kept on file. 13 Vin. Abr. 211; 1 Littleton 113; 1 Hawk. Pl. Cr. 7, 207. . . . Filing a paper, in modern usage, consists in placing it in the custody of the proper official by the party charged with the

duty, and the making of the proper indorsement by the officer. Stone v. Crow, 2 S. D. 525, 51 N. W. 335. In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become a part of the public record. It is not synonymous with deposited; People v. Peck, 67 Hun, 560, 22 N. Y. S. 576' 2 Bouv. Law Dict. 1219, 'File'."

In the case of *Poynor v. Commissioner of Internal Revenue,* 81 F. 2d 521, petitions for redetermination were sent within the 90-day statutory period from Fort Worth, Texas, by registered mail but did not arrive until the 92nd day after the deficiency notice had been mailed by the Commissioner. Evidence was introduced at the hearing on the motions to dismiss showing that under scheduled air mail service the petitions would have been delivered to the Board of Tax Appeals on the 90th day and that the delay was due to adverse weather conditions. The court held the filing was not timely and stated that a paper is filed when it is delivered to the proper official and received by him to be kept on file. The court determined that the depositing of a paper in the post office within time under the usual course of mail for it to reach the Board within the time allowed is not a filing of the paper with the Board, citing *United States v. Lombardo*, 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897. The case of *Louisiana Discount Corporation v. Commissioner of Internal Revenue*, 193 F. 2d 495, was decided under the authority of *Poynor v. Commissioner of Internal Revenue, supra.*

In the case of *Stebbins' Estate v. Helvering,* 121 F. 2d 892, the taxpayer on the 89th day took two steps: he sent a telegram to the Board of Tax Appeals stating that the formal petition requesting determination was being forwarded that day, and he sent the formal petition to the Board by air mail. Because of unfavorable weather conditions, however, the mail was transferred from plane to railroad, and the petition was not received by the Board until the 91st day. The Board held that the telegram was not a petition and dismissed the appeal as being untimely. The United States Court of Appeals for the District of Columbia citing the cases of *Lewis-Hall Iron Works v. Blair, supra,* and *Poynor v. Commissioner of Internal Revenue, supra,* upheld the dismissal upon the basis that the requirement for the filing of an appeal during the statutory period was jurisdictional and could not be set aside on equitable grounds.

Similar is the case of *Di Prospero v. Commissioner of Internal Revenue,* 176 F. 2d 76, wherein the petition for redetermination of the deficiency was sent to the Tax Court by air mail, special delivery, from San Francisco. The petition arrived in Washington, D. C., at 2:45 P. M. on the 90th day from the date of mailing of the notice of tax deficiency, and the messenger bearing the petition arrived at the Tax Court after its normal closing hour of 5:15 P. M. The petition was returned to the post office and delivered the following, or 91st day. The Tax Court dismissed the petition for lack of jurisdiction, and was affirmed by the Court of Appeals (9th Cir.), which held that the Tax Court could require the filing of documents during business hours and the taxpayer's failure to file his appeal within the 90-day period precluded consideration of the petition. In similar vein is the case of

Kiker v. Commissioner of Internal Revenue, 218 F. 2d 389, wherein the taxpayer mailed the petition within time for it to arrive at the Tax Court on the 90th day, but because of wrong zone number on the envelope the petition was not received by the Tax Court until the 91st day. The court held this filing to be untimely.

These Federal cases holding that the timely filing of a notice of appeal was a jurisdictional prerequisite to the perfection of a valid appeal were cited in the case of *Van De Veer v. Dept. of Alcoholic Beverage Control, supra*, which reaffirmed the decision in the case at bar. Respondents submit that under Federal and California law it is now established that the failure of a litigant to file an appeal within the required time divests the appellate body of jurisdiction to consider the merits of the case. Thus, when the motion of the Department to dismiss petitioner's appeal was granted by the Appeals Board there was no longer any legal obligation upon the Department to prepare a transcript since there was in fact no appeal in existence to be considered by the Appeals Board.

The petition for writ of certiorari reveals upon its face that petitioner did not exhaust its administrative remedy because of its own lack of diligence. This failure of the petitioner placed it beyond the assistance of the reviewing body for, as stated in the case of *Dolezilek v. Commissioner of Internal Revenue*, 212 F. 2d 458:

> ". . . . One who seeks to avail himself of a special statutory remedy must comply with the conditions and time limits prescribed by the statute."

Conclusion

Respondents respectfully submit that the petitioner has failed to present a substantial federal question requiring this Honorable Court to exercise its jurisdiction in the matter. Upon the record and for the reasons hereinabove stated, respondents respectfully request that the petition for writ of certiorari be denied.

EDMUND G. BROWN,
Attorney General,

EIMO G. FUNKE,
Assistant Attorney General,

EDWARD M. BELASCO,
Deputy Attorney General,
Attorneys for Respondents.